

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

R. DENNIS COOK, AHTANUM GENERAL
STORE,

Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF ECOLOGY,

Respondent.

PCHB NO. 05-106

ORDER GRANTING
SUMMARY JUDGMENT

This matter comes before the Pollution Control Hearings Board on a motion from the Washington State Department of Ecology (Ecology) seeking dismissal of R. Dennis Cook's appeal of a \$500 civil penalty.¹ Ecology contends it is entitled to dismissal because the appeal was filed with the Board more than 30 days after receipt of the notice of penalty, and therefore the Board does not have jurisdiction to hear the appeal.

The Board was comprised of William H. Lynch, Chair, and Kathleen D. Mix.² Administrative Appeals Judge, Kay M. Brown presided for the Board. Andrea L. Clausen, Assistant Attorney General, represented Ecology. R. Dennis Cook represented himself.

The Board reviewed and considered the following pleadings, which were submitted by the parties:

¹ The caption in this matter is amended to more accurately reflect that Mr. Cook, as sole proprietor of the Ahtanum General Store, is the recipient of Ecology's penalty.

² The third position on the Board is currently vacant.

1. Notice of Appeal;
2. Ecology's Motion to Dismiss, Memorandum in support of Motion to Dismiss, Declaration of Christina Zerby, with attachments A through F, Declaration of Frosti Smith with attachments;
3. Ahtanum General Store's Reply to Ecology's Motion, with attachments;
4. Ecology's Reply to Ahtanum General Store's Reply, Declaration of Andréa Clausen with Attachment A; and,
5. Letter filed January 13, 2006, by Ecology, with attached insurance policy change endorsement.

Having fully considered the record in this case and being fully advised, the Board enters the following ruling.

FACTUAL BACKGROUND

On May 20, 2005, an Ecology inspector completed a compliance inspection on an underground storage tank system located at the Ahtanum General Store, 8301 Ahtanum Road, Yakima, WA. The Ahtanum General Store is a sole proprietorship owned by R. Dennis Cook. *Declaration of Zerby, Declaration of Clausen with attachments from the Department of Licensing.*

As a result of the inspection, a Notice of Non-Compliance and Notice of Penalty was sent via certified mail on June 1, 2005, to R. Dennis Cook, the Ahtanum General Store, 8301 Ahtanum Road, Yakima, WA.³ The notice was received at the Ahtanum General Store on June

³Initially, the notice was sent to Mr. Dennis Cook via certified mail at PO Box 1127, Yakima, Washington 98903. This was the address listed with Ecology. The letter was returned by the United States Postal Service with a sticker on the front stating, "forwarding order expired." *Declaration of Smith.*

1 3, 2005. Angela Parks, Ahtanum General Store manager, signed the return receipt card. Ms.
2 Parks checked the box on the return receipt card indicating that she was signing as agent. Mr.
3 Cook, however, did not actually see the notice until June 9, 2005. *Declaration of Zerby,*
4 *Attachment C, and Cook's Response.*

5 On June 30, 2005, Mr. and Mrs. Cook conveyed the property at 8301 Ahtanum Road, by
6 quitclaim deed, to an entity called the Ahtanum General Store, LLC. *Cook's response and*
7 *attached quitclaim deed.*

8 Ecology received two letters from Mr. Cook on July 11, 2005, requesting waiver of the
9 penalty. On July 12, 2005, Ecology issued a Notice of Disposition Upon Application for Relief
10 from Penalty affirming the original penalty on the grounds that Mr. Cook's Application for
11 Relief was not timely submitted. *Declaration of Zerby, Attachments D and E.*

12 Mr. Cook appealed Ecology's Notice of Disposition to this Board on July 20, 2005.
13 Ecology filed this summary judgment, requesting that the Board dismiss Mr. Cook's appeal
14 because he failed to timely appeal Ecology's Notice of Penalty.

15 ANALYSIS

16 I.

17 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
18 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
19 opposing party. *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152, 1155 (1977). The party
20 moving for summary judgment must show there are no genuine issues of material fact, and the

1 moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co.*,
2 *Inc.*, 131 Wn. 2d 171, 182; 930 P. 2d 307, 313 (1997). A material fact in a summary judgment
3 proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d
4 451, 456, 824 P. 2d 1207, 1210 (1992). The trier of fact must construe the evidence and consider
5 the material facts and all reasonable inferences therefrom in the light most favorable to the
6 nonmoving party. *Weatherbee v. Gustafson*, 64 Wn. App. 128, 131, 822 P. 2d 1257 (1992). If
7 the moving party is a respondent and meets this initial showing, then the inquiry shifts to the
8 party with the burden of proof at trial. If, at this point, the non-moving party fails to make a
9 showing sufficient to establish the existence of an element essential to that party's case, and on
10 which that party will bear the burden of proof at trial, then the trial court should grant the motion.
11 *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182, 187(1989).

12 II.

13 Here, the Board concludes there are no disputed issues of fact, and therefore this matter
14 can be decided on summary judgment.

15 III.

16 RCW 43.21B.300 sets out the appeal rights for a person subject to a penalty. It allows for
17 two options for appeal by the penalty recipient. The first option is to request remission or
18 mitigation of the penalty from Ecology. See RCW 43.21B.300(1). This request must be made to
19 Ecology within 30 days of the date of receipt of the penalty. If, after a decision is obtained from
20 Ecology the penalty recipient is not satisfied, he or she can appeal Ecology's decision to this

1 Board. An appeal of Ecology's decision must be made within 30 days of receipt of Ecology's
2 decision on the remission/mitigation request.

3 IV

4 The second option is to file an appeal directly with this Board within 30 days of receipt of
5 the penalty. RCW 43.21B.300(2).

6 V.

7 Both options require the recipient to take action within 30 days of receipt of the penalty.
8 Ecology contends, in its motion, that Mr. Cook did not take either action within the 30-day
9 period. To address this argument, the Board must determine the date of receipt of the penalty by
10 Mr. Cook.

11 VI.

12 RCW 43.21B.001(2) defines "date of receipt" as

13 (a) Five business days after the date of mailing; or

14 (b) The date of actual receipt, when the actual receipt date can be proven by a
15 preponderance of the evidence. The recipient's sworn affidavit or declaration indicating
16 the date of receipt, which is unchallenged by the agency, shall constitute sufficient
evidence of actual receipt. The date of actual receipt, however, may not exceed forty-five
days from the date of mailing.

17 VII.

18 Applying part (a) of this definition to the facts in this case, the penalty was mailed on
19 June 1, 2005. Five business days after that would result in a date of receipt of June 8, 2005. To
20 be timely based on this date of receipt, Mr. Cook would have had to file his appeal by July 8,
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1 2005. Since his appeal to Ecology was not filed until July 11, 2005, it was not timely based on
2 the criteria set out in RCW 43.21B.001(2)(a).

3 VIII.

4 Alternatively, under part (b) of this definition, the date of actual receipt can be used when
5 the actual receipt date can be proven by a preponderance of the evidence. Here there is no
6 conflict in the evidence. The undisputed facts are that Angela Parks, the Ahtanum General Store
7 manager, received the notice on June 3, 2005. Mr. Cook, however, did not personally see the
8 notice until June 9, 2005.⁴ The question then becomes, which is the date of actual receipt for
9 purposes of RCW 43.21B.001(2)(b)? The Board concludes based on its prior decisions, that the
10 date of actual receipt is June 3, 2005, the date the Ahtanum General Store Manager signed for
11 the notice.

12 IX.

13 The Ahtanum General Store is a sole proprietorship owned by Mr. Cook. As such, the
14 Ahtanum General Store is legally indistinguishable from Mr. Cook. *Public Employees Mut. Ins.*
15 *Co. v. Kelly*, 60 Wn. App. 610, 614-615, 805 P.2d 822, 825(1991), *rev. denied* 116 Wn. 2d.

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18 ⁴ Ecology contends that Mr. Cook's bare assertion that he personally received the notice on June 9, 2005 cannot be
19 considered proof because he has not submitted a sworn affidavit. However, because this matter is being decided on
20 summary judgment and Mr. Cook is the nonmoving party, all factual matters must be construed in his favor. Also,
21 the Board has the authority to waive any non-jurisdictional rules for a party not represented by legal counsel where
necessary to avoid manifest injustice. WAC 371-08-385. Here, the Board waives the requirement that factual
information submitted with a motion be submitted in the form of a sworn declaration, and considers Mr. Cook's
unsworn statement that he received the notice on June 9, 2005 as an established fact for purposes of this summary
judgment motion.

1 1031, 813 P.2d. 582 (1991). Therefore, receipt of the notice of penalty by an appropriate person
2 at the Ahtanum General Store constitutes receipt by Mr. Cook.

3 X.

4 It is reasonable to assume that the general manager of a business would have the
5 authority to sign for mail sent to the business. In past decisions of the Board, the Board has
6 concluded that receipt by a receptionist at the corporate head office, and receipt by a corporate
7 secretary of a corporation, constituted receipt by the corporations involved. *See Atlas Foundry*
8 *& Machine Company v. Ecology*, PCHB No. 91-210 (Order Denying Reconsideration)(Oct. 29,
9 1992), *CH2O, Inc. v. Ecology*, PCHB No. 96-149 (Order of Dismissal)(April 15, 1996). Here,
10 Mr. Cook does not challenge Angela Parks' authority to sign for certified mail or to represent
11 that she is his general agent at the store. The Board concludes that June 3, 2005, the date Angela
12 Parks received the notice, was the date of receipt of notice by Mr. Cook for purposes of RCW
13 43.21B.001(2)(b). Using June 3, 2005, as the date of receipt results in a filing date of no later
14 than July 5, 2005.

15 XI.

16 Under either RCW 43.21B.001(2)(a) or (b) Mr. Cook's appeal to Ecology, filed on July
17 11, 2005, was untimely.

18 XII.

19 Mr. Cook makes two arguments against the granting of Ecology's summary judgment
20 motion. First, Mr. Cook argues that the penalty should not have been issued to him because he
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1 was not the owner of the property upon which the underground storage tanks in question are
2 located. He contends that Ahtanum General Store, LLC, a limited liability company, owns the
3 property. The documentation submitted by Mr. Cook does show that Mr. and Mrs. Cook
4 transferred the property to the Ahtanum General Store, LLC. However, the documentation also
5 shows that this transfer did not occur until June 30, 2005, well after the violations alleged here
6 had occurred and the notice of penalty had been issued. At the relevant time for this appeal, Mr.
7 Cook was the owner of the property at 8301 Ahtanum Road, and therefore the penalty was issued
8 to the correct party, and notice was effectuated on the correct party.

9 XIII.

10 Mr. Cook's second argument is that he timely appealed Ecology's notice of disposition to
11 this Board, and that this second timely appeal corrected the fact that his initial appeal to Ecology
12 was late. The Board agrees that Mr. Cook's appeal to this Board of the notice of disposition was
13 timely. That does not change the fact that Mr. Cook's initial appeal to Ecology for
14 remission/mitigation was untimely.

15 XIV.

16 Upon initial receipt of the notice of penalty, Mr. Cook could have filed an appeal, either
17 with Ecology or with this Board, within 30 days. He did neither. Instead, more than 30 days
18 after receipt of the penalty, he filed an appeal with Ecology for remission/mitigation. Ecology
19 determined that this request was late, and issued a notice of disposition affirming the penalty on
20 this basis.

1 XV.

2 Mr. Cook's timely appeal of Ecology's decision entitles him to a review by this Board of
3 the correctness of Ecology's decision that his appeal was untimely. It does not reinstate the right
4 that he initially had, to a review of Ecology's decision to issue the penalty, unless this Board
5 concludes that Ecology's decision that the appeal was untimely, was in error. To the contrary,
6 the Board has concluded, like Ecology did, that Mr. Cook's appeal to Ecology was untimely.
7 Therefore, the Board affirms Ecology's decision and upholds the penalty.

8 Based on the foregoing analysis, the Board enters the following

9 ORDER

10 Respondent Ecology's summary judgment motion is granted and this appeal is dismissed.

11 DONE this 3rd day of February 2006.

12 POLLUTION CONTROL HEARINGS BOARD

13 William H. Lynch, Chair

14 Kathleen D. Mix, Member

15 Kay M. Brown, Presiding
16 Administrative Appeals Judge

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